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GAZA  
Georgia Association of Zoning Administrators



APA  
GA

## The Legal Side of Zoning: Old Laws, New Laws and Special Topics

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### TOPICS

- Constitutional Issues
- Zoning Procedures Act
- Using Zoning Standards
- Zoning Conditions / Special Use Permits
- Annexation
- Variances
- Conflicts of Interest and Other Ethical Issues



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## What is Zoning?



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### **ZPL Definition – O.C.G.A. § 36-66-3(3)**

“Zoning” means the power of local governments to provide within their respective territorial boundaries for the zoning or districting of property for various uses and the prohibition of other or different uses within such zones or districts and for the regulation of development and the improvement of real estate within such zones or districts in accordance with the uses of property for which such zones or districts were established.



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### **Constitutional Authority to Plan and Zone**

The governing authority of each county and of each municipality may adopt plans and may exercise the power of zoning. This authorization shall not prohibit the general assembly from enacting general laws establishing procedures for the exercise of such power.

Ga. Const. Art. 9, §2, Para. IV



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### **Constitutional Restrictions on the Exercise of Zoning Power**

1. Taking Without Just Compensation
2. Due Process
3. Equal Protection
4. Vested Rights



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## Letter of Constitutional Objections

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## How do you know if a zoning decision is constitutional?

- Does the existing zoning...
- impose a ***significant detriment*** ...
- that is insubstantially related to the public health, safety and welfare?

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## Variance

- When an ordinance by its strict construction would result in a taking, the ordinance usually has a variance provision.

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### **Vested Rights**

- The right to create a use *not currently in existence* because of official approval and substantial expenditures in reliance of the approval

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### **Non-conforming / grandfathered use**

- An *established use* that was once legal but which is no longer legal because of a change in the ordinances.
- Grandfathering is granted by ordinance
- Subject to the terms of the ordinance

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### **Common non-conforming use provisions**

- May not be expanded except in conformity
- May not be rebuilt if destroyed

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## Equal Protection

- To treat two similarly situated properties differently
- To enforce the zoning ordinance differently for two similarly situated properties
- Importance of Future Land Use Map

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## Due Process

- Failure to provide notice and hearing
- Failure to comply with Zoning Procedures Law
- Not necessarily the same as a trial

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## ZONING PROCEDURES LAW

O.C.G.A. Chapter 36-66

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**ZONING DECISION** means a final legislative action by a local government which results in:

- (A) The adoption of a zoning ordinance;
- (B) The adoption of an amendment to a zoning ordinance which changes the text of the zoning ordinance;
- (C) The adoption of an amendment to a zoning ordinance which rezones property from one zoning classification to another;
- (D) The adoption of an amendment to a zoning ordinance by a municipal local government which zones property to be annexed into the municipality; or
- (E) The grant of a permit relating to a special use of property.
- (F) The grant or denial of a variance or conditions concurrent and in conjunction with (C) or (E) above.

O.C.G.A. § 36-66-3(4)



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## NOTICE OF PUBLIC HEARING

- ❖ Notice published in a newspaper of general circulation within the territorial limits of the jurisdiction at least 15 days, but not more than 45 days, prior to the hearings.
- ❖ Under the prior version of HB1405, some decisions got 30 days of notice, with letter to property owner, but this was changed in recent amendment



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## PUBLIC HEARING PROCEDURES

A local government is required to give equal time to both proponents and opponents of the zoning application. In addition, the written procedures must state that each side shall have no less than 10 minutes.

O.C.G.A. § 36-66-5(a)



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### How do you conduct a fair hearing?

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### ZONING STANDARDS UNDER ZPL

[E]ach local government shall adopt standards governing the exercise of the zoning power, and such standards may include any factors which the local government finds relevant in balancing the interest in promoting the public health, safety, morality, or general welfare against the right to the unrestricted use of property.

O.C.G.A. § 36-66-5(b)

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### How do you use the standards?

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**Guhl Factors**  
**(Guhl v. Holcolmb Bridge Road Corp., 238 Ga. 322 (1977))**

- (1) existing uses and zoning of nearby property;
- (2) the extent to which property values are diminished by the particular zoning restrictions;
- (3) the extent to which the destruction of property values of the plaintiffs promotes the health, safety, morals or general welfare of the public;

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**Guhl Factors**

- (4) the relative gain to the public, as compared to the hardship imposed upon the individual property owner;
- (5) the suitability of the subject property for the zoned purposes; and
- (6) the length of time the property has been vacant as zoned considered in the context of land development in the area in the vicinity of the property.

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**How do we use comprehensive planning?**

- Future Land Use Map
- Character Areas
- Service Delivery

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## Rezoning

Legislative decisions

De novo appeals

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## What about annexations?

- ZPL still applies
- Notice procedure to the County
- Annexation arbitration

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## Notice Requirements

### Notice to Counties of Proposed Annexations

- Each method of annexation, except for the annexation of unincorporated islands, provides that the city send notice of the proposed annexation to the county in which the territory under consideration is located within 30 days.
- Within five days of receipt of such notice, the county must notify the city of the presence of any county-owned public facilities within the area proposed for annexation.

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## Notice Requirements

### County Property in Area Proposed for Annexation

Control and ownership of county-owned property is not changed by municipal annexation, unless and until:

- It is no longer usable for service to the unincorporated area of the county as a result of the annexation.
- It is funded by revenues obtained from the unincorporated area of the county.
- It is used to provide services solely to the unincorporated areas of the county.
- The county adopts a resolution declaring that the facility is no longer usable for service to the unincorporated area as a result of annexation.

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## Notice Requirements

### County Property in Area Proposed for Annexation

- In the event that county property is rendered no longer usable due to annexation, the county must be compensated the fair market value by the city, and the city takes ownership.
- When the city takes in land on both sides of a county road right-of-way, it assumes ownership and control, care, and maintenance.
- The city and county can come to an agreement that alters these defaults, and if they can not agree on the fair market value, it can be submitted to a special master for determination.

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## Notice Requirements

### Submittal of Annexation Information

Within 30 days of the last day of the quarter in which an annexation becomes effective, the annexing city must submit a report to: 1) the Department of Community Affairs, 2) the Legislative and Congressional Reapportionment Office of the General Assembly, and 3) the county governing authority.

The report must include:

- the area annexed (identifying the county in which it is located), and
- the total acreage annexed, the enactment date and effective date of the annexation ordinance, or Act of the General Assembly, and
- the details concerning the legal authority used to accomplish the annexation, and
- a list of roadways, bridges, and rights-of-way on state routes that were annexed, and
- a digital shapefile of the annexed area.

The annexing city must also submit a letter indicating the city's intention to inform the U.S. Census Bureau of the boundary change.

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## Annexation Arbitration

- County has 45 days to delivery objection to City and DCA by vote of County-governing authority
- Within 20 days thereafter, the DCA appoints an arbitration panel of 3 persons (one City elected official or manager/admin., one County elected official or manager/admin., and one person with at least a master's degree employed by a college in Georgia) – process for picking/striking names
- Decision to generally be rendered within 60 days of appointment of panel
- Meetings subject to Open Meetings Act, and cost is split equally unless one side has taken frivolous position
- Right to appeal to superior court within 10 days of the panel's decision for limited grounds



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## ANNEXATION AND ZONING



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## O.C.G.A. § 36-36-113(a)

The county governing authority may by majority vote object to the annexation because of a material increase in burden upon the county directly related to any one or more of the following:

- (1) The proposed change in zoning or land use;
- (2) Proposed increase in density; and
- (3) Infrastructure demands related to the proposed change in zoning or land use.



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### O.C.G.A. § 36-36-113(b)

➤ Delivery of services may not be a basis for a valid objection but may be used in support of a valid objection if directly related to one or more of the subjects enumerated in paragraphs (1), (2), and (3) of subsection (a) of this Code section.

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### O.C.G.A. § 36-36-113(c)

➤ The objection provided for in subsection (a) of this Code section shall document the nature of the objection specifically providing evidence of any financial impact forming the basis of the objection and shall be delivered to the municipal governing authority ~~by certified mail or statutory overnight~~ and the department by verifiable delivery to be received not later than the end of the ~~thirtieth~~ **forty-fifth** calendar day following receipt of the notice provided for in [Code Section 36-36-111](#).

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### O.C.G.A. § 36-36-113(d)

In order for an objection pursuant to this Code section to be valid, the proposed ~~change in zoning or land use~~ **annexation** must:

(1) Result in:

(A) A substantial change in the intensity of the allowable use of the property or a change to a significantly different allowable use; or

(B) A use which significantly increases the net cost of infrastructure or significantly diminishes the value or useful life of a capital outlay project, as such term is defined in [Code Section 48-8-110](#), which is furnished by the county to the area to be annexed; and

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### O.C.G.A. § 36-36-113(d)

In order for an objection pursuant to this Code section to be valid, the proposed change in zoning or land use must:

- (2) ~~Differ~~ **Authorize or result in a land use that differs** substantially from the existing uses suggested for the property by the county's comprehensive land use plan or permitted for the property pursuant to the county's zoning ordinance or its land use ordinances.

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### O.C.G.A. § 48-8-110

- “Capital outlay project” means major, permanent, or long-lived improvements or betterments, such as land and structures, such as would be properly chargeable to a capital asset account and as distinguished from current expenditures and ordinary maintenance expenses. Such term shall include, but not be limited to, roads, streets, bridges, police cars, fire trucks, ambulances, garbage trucks, and other major equipment.

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### What if it is a DRI?

- Development of Regional Impact
- DRI review before any decision is made.

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## Special Use Permits

- Uses which are permitted in a district only with special approval from the BOC or City Council
- Importance of criteria
- Common Examples:
  - Landfill - Crematory - Asphalt Plant

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## Quasi-Judicial Hearings

- Special use permits, variances, administrative appeals
- Record Review

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## City of Roswell v. Fellowship Christian School, Inc.

- Special use permit denied because of traffic concerns.
- Statement of traffic concerns by neighbors on the record was sufficient evidence to support decision.

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## Can we put conditions on zoning decisions?

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## Zoning Conditions

Conditions imposed so as to ameliorate the negative effects of the proposed rezoning for the protection of neighboring properties

What does your ordinance say about conditional uses?

Due Process Concerns

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## Zoning Conditions

- Put in writing, or clearly state in the motion
- Condition to the site plan
- Conditions become part of the ordinance and can only be amended by rezoning action

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### Development Impact Fee Act, OCGA § 36-71-1

- To ensure that new growth pays no more than its proportionate share of the costs of public facilities needed to serve new growth.
- Public facilities include: Water system, sewer system, stormwater system, road system, parks and recreation, public safety (fire, police, E911) and libraries.

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### Development Impact Fee Act, OCGA § 36-71-1

- Development “exaction”: compels payment, dedication, or contribution of goods, services, land, or money as a condition of approval.
- System improvements can only be imposed by impact fee. Project improvements can still be required.

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### Variances and Administrative Appeals

- Commonly handled by BZA, but not always
- Role of Variance
- Role of Administrative Appeal

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## Quasi-judicial hearings

-  "sort-of like a trial"
-  Record review to the Superior Court
-  Writ of Certiorari....  
Converting to Petition for Review July 1, 2023

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
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## Importance of evidence in the record

- What are the criteria?
- What is the evidence in the record?
  - Application
  - Staff analysis
  - Public comment

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## Administrative variance

- Numerical limitation: i.e., 20%
- Criteria
- Right of appeal

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## CONFLICT OF INTEREST IN ZONING ACT

O.C.G.A. Chapter 36-67(A)

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## WHICH PUBLIC OFFICIALS?

- PLANNING COMMISSION
- GOVERNING AUTHORITY
  - MAYOR
  - COUNCIL
  - COUNTY COMMISSION

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## WHEN?

- Only “Rezoning action”: action by local government adopting an amendment to a zoning ordinance which has the effect of rezoning real property from one zoning classification to another.
- Not ZPL Definition: adopt ordinance, amend text, amend map, rezone annexed property, and special use permit

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## PUBLIC OFFICIALS

- Any ownership interest in the property
  - Disclose and disqualify
- Financial interest in business entity with any ownership in the property
  - Financial interest = 10%
  - Disclose and disqualify

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## PUBLIC OFFICIALS (continued)

- Family members with ownership or financial interest
  - Family = spouse, mother, father, sister, brother, son, daughter
  - Disclose

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## PUBLIC OFFICIALS

- Prohibited activities: actions carried out in the official's public capacity
- Permitted activities: actions normally and properly undertaken by any other private property owner including supplementation of application, responding to inquiries from zoning authorities, or altering the property at issue or the business conducted thereon.
- Little v. City of Lawrenceville, 272 Ga. 340 (2000)

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## APPLICANTS and OPPONENTS

- Applicant, opponent or attorneys.
- Campaign gifts or contributions totaling \$250.
- 2 yrs. preceding the zoning application.
- File within 10 days of application for applicant, 5 days prior to hearing for opponent.

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## ADDITIONAL ETHICAL CONSIDERATIONS CONCERNING VOTING

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## Ethical Issues

- Improper Conflict of Interest: When a public officer, in the discharge of his public function, acts upon a measure relating to a *specific transaction* and such transaction shall *directly* and *immediately* affect his pecuniary interest. A remote or speculative financial interest will not support a conflict of interest allegation.

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## Ethical Issues

- White v. Board of Com'rs of McDuffie County, 252 Ga.App. 120 (2001) – bank officer on Board
- Dunaway v. City of Marietta, 251 Ga. 727 (1983) – VP disclosed but still presided

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## Ethical Issues

- Public officers are the trustees and servants of the people and are at all times amenable to them. Const. Art. I, §2, ¶ 1
- Crozer et al. v. Reichert et al., 275 Ga. 118 (2002) – planning director sought approval, subordinate reviewed
- Wyman v. Popham, 252 Ga. 247 (1984) – Commissioners sold to applicant

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## Staying Out of Trouble

- Avoid prejudgment
- Avoid pre-hearing public comments
- Avoid ex parte communications
  - Legislative versus quasi-judicial meetings
- Limit comments at hearing to relevant criteria
- Disclose and recuse if conflict of interest is questionable

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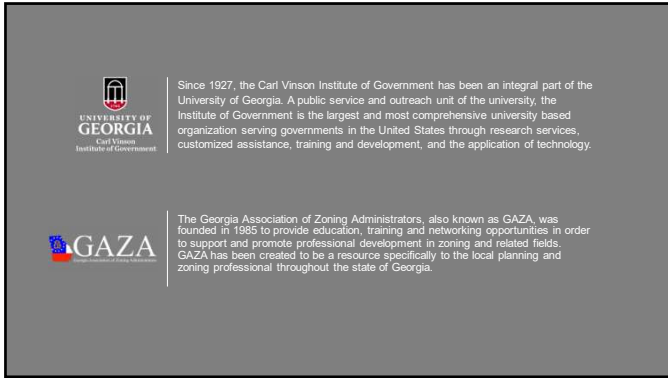
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